

H. L. A. Hart

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## Immorality and Treason

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The most remarkable feature of Sir Patrick's lecture is his view of the nature of morality—the morality which the criminal law may enforce. Most previous thinkers who have repudiated the liberal point of view have done so because they thought that morality consisted either of divine commands or of rational principles of human conduct discoverable by human reason. Since morality for them had this elevated divine or rational status as the law of God or reason, it seemed obvious that the state should enforce it, and that the function of human law should not be merely to provide men with the opportunity for leading a good life, but actually to see that they lead it. Sir Patrick does not rest his repudiation of the liberal point of view on these religious or rationalist conceptions. Indeed much that he writes reads like an abjuration of the notion that reasoning or thinking has much to do with morality. English popular morality has no doubt its historical connexion with the Christian religion: 'That,' says Sir Patrick, 'is how it got there.' But it does not owe its present status or social significance to religion any more than to reason.

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What, then, is it? According to Sir Patrick it is primarily a matter of feeling. 'Every moral judgment,' he says, 'is a feeling that no right-minded man could act in any other way without admitting that he was doing wrong.' Who then must feel this way if we are to have what Sir Patrick calls a public morality?

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Professor Hart's writing has been extremely influential in recent legal philosophy, and in contemporary Anglo-American philosophy generally. His major works include: *Causation in the Law* (with A. M. Honore) (1959); *The Concept of Law* (1961); *Law, Liberty, and Morality* (1963); and *Punishment and Responsibility* (1968).

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He tells us that it is 'the man in the street,' 'the man in the jury box,' or (to use the phrase so familiar to English lawyers) 'the man on the Clapham omnibus.' For the moral judgments of society so far as the law is concerned are to be ascertained by the standards of the reasonable man, and he is not to be confused with the rational man. Indeed, Sir Patrick says 'he is not expected to reason about anything and his judgment may be largely a matter of feeling.'

#### **Intolerance, Indignation, and Disgust**

But what precisely are the relevant feelings, the feelings which may justify use of the criminal law? Here the argument becomes a little complex. Widespread dislike of a practice is not enough. There must, says Sir Patrick, be 'a real feeling of reprobation.' Disgust is not enough either. What is crucial is a combination of intolerance, indignation, and disgust. These three are the forces behind the moral law, without which it is not 'weighty enough to deprive the individual of freedom of choice.' Hence there is, in Sir Patrick's outlook, a crucial difference between the mere adverse moral judgment of society and one which is inspired by feeling raised to the concert pitch of intolerance, indignation, and disgust.

This distinction is novel and also very important. For on it depends the weight to be given to the fact that when morality is enforced individual liberty is necessarily cut down. Though Sir Patrick's abstract formulation of his views on this point is hard to follow, his examples make his position fairly clear. We can see it best in the contrasting things he says about fornication and homosexuality. In regard to fornication, public feeling in most societies is not now of the concert-pitch intensity. We may feel that it is tolerable if confined: only its spread might be gravely injurious. In such cases the question whether individual liberty should be restricted is for Sir Patrick a question of balance between the danger to society in the one scale, and the restriction of the individual in the other. But if, as may be the case with homosexuality, public feeling is up to concert pitch, if it expresses a 'deliberate judgment' that a practice as such is injurious to society, if there is 'a genuine feeling that it is a vice so abominable that its mere presence is an offence,' then it is beyond the limits of tolerance, and society may eradicate it. In this case, it seems, no further balancing of the claims of individual liberty is to be done, though as a matter

of prudence the legislator should remember that the popular limits of tolerance may shift: the concert pitch feeling may subside. This may produce a dilemma for the law; for the law may then be left without the full moral backing that it needs, yet it cannot be altered without giving the impression that the moral judgment is being weakened.

#### **A Shared Morality**

If this is what morality is—a compound of indignation, intolerance, and disgust—we may well ask what justification there is for taking it, and turning it as such, into criminal law with all the misery which criminal punishment entails. Here Sir Patrick's answer is very clear and simple. A collection of individuals is not a society; what makes them into a society is among other things a shared or public morality. This is as necessary to its existence as an organized government. So society may use the law to preserve its morality like anything else essential to it. 'The suppression of vice is as much the law's business as the suppression of subversive activities.' The liberal point of view which denies this is guilty of 'an error in jurisprudence': for it is no more possible to define an area of private morality than an area of private subversive activity. There can be no 'theoretical limits' to legislation against immorality just as there are no such limits to the power of the state to legislate against treason and sedition.

Surely all this, ingenious as it is, is misleading. Mill's formulation of the liberal point of view may well be too simple. The grounds for interfering with human liberty are more various than the single criterion of 'harm to others' suggests: cruelty to animals or organizing prostitution for gain do not, as Mill himself saw, fall easily under the description of harm to others. Conversely, even where there is harm to others in the most literal sense, there may well be other principles limiting the extent to which harmful activities should be repressed by law. So there are multiple criteria, not a single criterion, determining when human liberty may be restricted. Perhaps this is what Sir Patrick means by a curious distinction which he often stresses between theoretical and practical limits. But with all its simplicities the liberal point of view is a better guide than Sir Patrick to clear thought on the proper relation of morality to the criminal law: for it stresses what he obscures—namely, the points at which thought is needed before we turn popular morality into criminal law.

**Society and Moral Opinion**

No doubt we would all agree that a consensus of moral opinion on certain matters is essential if society is to be worth living in. Laws against murder, theft, and much else would be of little use if they were not supported by a widely diffused conviction that what these laws forbid is also immoral. So much is obvious. But it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web: one which will fall to pieces carrying society with it, unless all its emphatic vetoes are enforced by law. Surely even in the face of the moral feeling that is up to concert pitch—the trio of intolerance, indignation, and disgust—we must pause to think. We must ask a question at two different levels which Sir Patrick never clearly enough identifies or separates. First, we must ask whether a practice which offends moral feeling is harmful, independently of its repercussion on the general moral code. Secondly, what about repercussion on the moral code? Is it really true that failure to translate this item of general morality into criminal law will jeopardize the whole fabric of morality and so of society?

We cannot escape thinking about these two different questions merely by repeating to ourselves the vague nostrum: 'This is part of public morality and public morality must be preserved if society is to exist.' Sometimes Sir Patrick seems to admit this, for he says in words which both Mill and the Wolfenden Report might have used, that there must be the maximum respect for individual liberty consistent with the integrity of society. Yet this, as his contrasting examples of fornication and homosexuality show, turns out to mean only that the immorality which the law may punish must be generally felt to be intolerable. This plainly is no adequate substitute for a reasoned estimate of the damage to the fabric of society likely to ensue if it is not suppressed.

Nothing perhaps shows more clearly the inadequacy of Sir Patrick's approach to this problem than his comparison between the suppression of sexual immorality and the suppression of treason or subversive activity. Private subversive activity is, of course, a contradiction in terms because 'subversion' means overthrowing government, which is a public thing. But it is grotesque, even where moral feeling against homosexuality is up to concert pitch, to think of the homo-

sexual behaviour of two adults in private as in any way like treason or sedition either in intention or effect. We can make it seem like treason only if we assume that deviation from a general moral code is bound to affect that code, and to lead not merely to its modification but to its destruction. The analogy could begin to be plausible only if it was clear that offending against this item of morality was likely to jeopardize the whole structure. But we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty, and dishonesty, merely because some private sexual practice which they abominate is not punished by the law.

Because this is so the analogy with treason is absurd. Of course 'No man is an island': what one man does in private, if it is known, may affect others in many different ways. Indeed it may be that deviation from general sexual morality by those whose lives, like the lives of many homosexuals, are noble ones and in all other ways exemplary will lead to what Sir Patrick calls the shifting of the limits of tolerance. But if this has any analogy in the sphere of government it is not the overthrow of ordered government, but a peaceful change in its form. So we may listen to the promptings of common sense and of logic, and say that though there could not logically be a sphere of private treason there is a sphere of private morality and immorality.

Sir Patrick's doctrine is also open to a wider, perhaps a deeper, criticism. In his reaction against a rationalist morality and his stress on feeling, he has I think thrown out the baby and kept the bath water; and the bath water may turn out to be very dirty indeed. When Sir Patrick's lecture was first delivered *The Times* greeted it with these words: 'There is a moving and welcome humility in the conception that society should not be asked to give its reason for refusing to tolerate what in its heart it feels intolerable.' This drew from a correspondent in Cambridge the retort: 'I am afraid that we are less humble than we used to be. We once burnt old women because, without giving our reasons, we felt in our hearts that witchcraft was intolerable.'

This retort is a bitter one, yet its bitterness is salutary. We are not, I suppose, likely, in England, to take again to the burning of old women for witchcraft or to punishing people for associating with those of a different race or colour, or to punishing people again for adultery. Yet if these things were viewed with intolerance, indignation, and disgust, as the second of them still is in some countries, it seems that on Sir

Patrick's principles no rational criticism could be opposed to the claim that they should be punished by law. We could only pray, in his words, that the limits of tolerance might shift.

#### Curious Logic

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It is impossible to see what curious logic has led Sir Patrick to this result. For him a practice is immoral if the thought of it makes the man on the Clapham omnibus sick. So be it. Still, why should we not summon all the resources of our reason, sympathetic understanding, as well as critical intelligence, and insist that before general moral feeling is turned into criminal law it is submitted to scrutiny of a different kind from Sir Patrick's? Surely, the legislator should ask whether the general morality is based on ignorance, superstition, or misunderstanding; whether there is a false conception that those who practise what it condemns are in other ways dangerous or hostile to society; and whether the misery to many parties, the blackmail and the other evil consequences of criminal punishment, especially for sexual offences, are well understood. It is surely extraordinary that among the things which Sir Patrick says are to be considered before we legislate against immorality these appear nowhere; not even as 'practical considerations,' let alone 'theoretical limits.' To any theory which, like this one, asserts that the criminal law may be used on the vague ground that the preservation of morality is essential to society and yet omits to stress the need for critical scrutiny, our reply should be: 'Morality, what crimes may be committed in thy name!'

As Mill saw, and de Tocqueville showed in detail long ago in his critical but sympathetic study of democracy, it is fatally easy to confuse the democratic principle that power should be in the hands of the majority with the utterly different claim that the majority, with power in their hands, need respect no limits. Certainly there is a special risk in a democracy that the majority may dictate how all should live. This is the risk we run, and should gladly run; for it is the price of all that is so good in democratic rule. But loyalty to democratic principles does not require us to maximize this risk: yet this is what we shall do if we mount the man in the street on the top of the Clapham omnibus and tell him that if only he feels sick enough about what other people do in private to demand its suppression by law no theoretical criticism can be made of his demand.